//

NO. 4451

In the Circuit Court of Appeals of the United States for the Ninth Circuit

E. H. BARBER, Naval Disbursing Officer,
Appellant

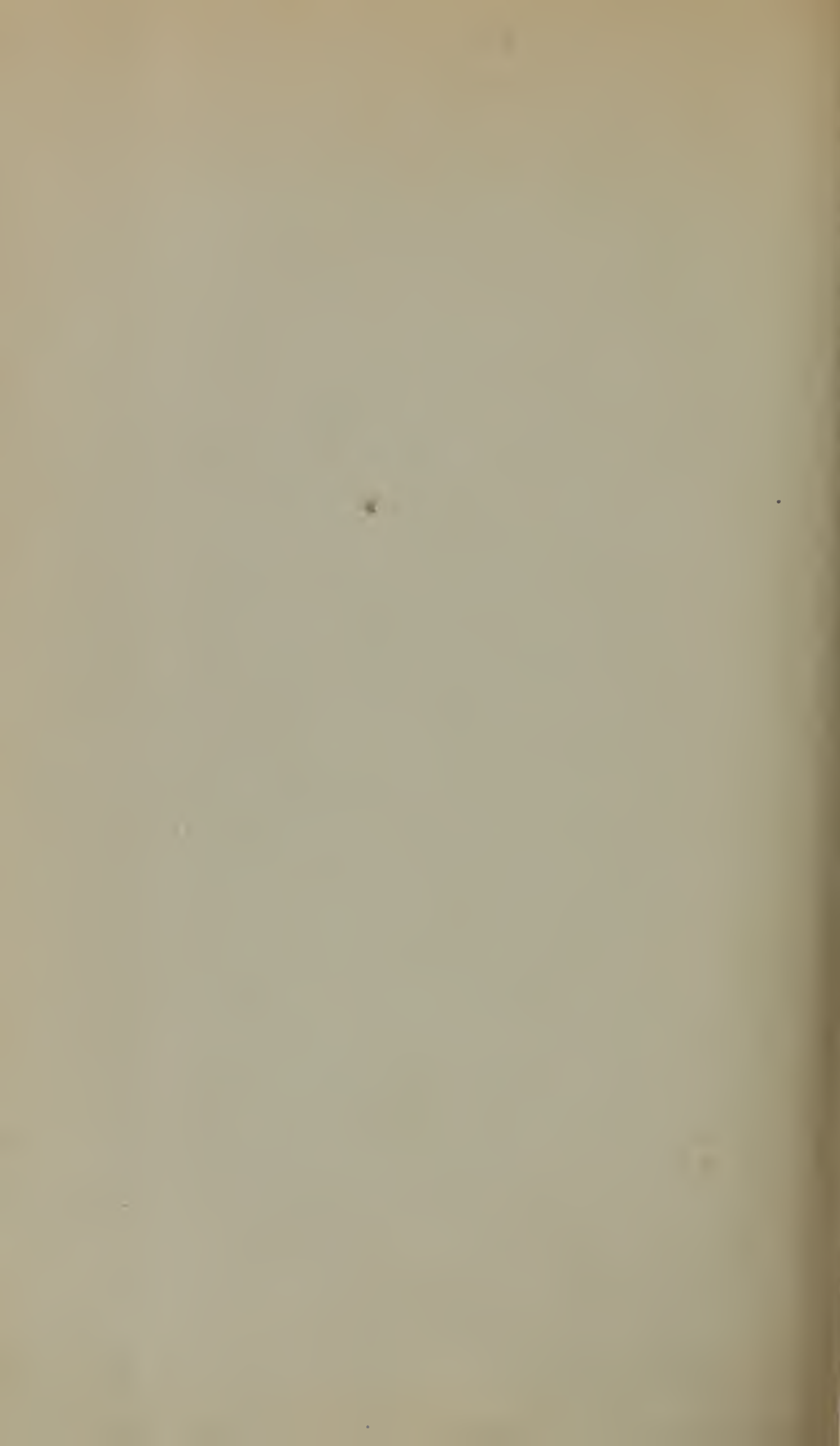
vs.

WILLIAM BRAWNER HETFIELD, Appellee

APPELLEE'S REPLY BRIEF

JAMES H. FARRAHER,
MOORE AND FARRAHER,
Attorneys for Appellee.

FILED
FEB - 7 1925
F. D. MONCKTON,
CLERK



INDEX

	PAGE
STATEMENT OF THE CASE	1-2
APPELLEE'S *PRECEDENTS*:	
Point at issue whether salary of naval officer can be checked against by disbursing officer	2
District Court of Florida holds in Dillon and Howe cases such checking illegal, because salary fixed by statute	2-3
Solicitor General and Attorney General refuse to appeal Dillon case	3
District Court of Columbia follows Dillon case	4
Secretary of Navy says Comptroller General is in error	4
Smith vs. Jackson leading case	5
Attorney General advises Comptroller Smith vs. Jackson good law	5
Louisiana District Court holds checkages illegal	5-6
Enumeration of points raised in Appellant's brief	6-7
REPLY TO POINTS RAISED BY APPELLANT:	
1. The court has jurisdiction over suits to redress the deprivation of a constitutional right	7-8
2. Not a suit against United States	8
3. Not a suit to recover salary	8
4. Cases cited by appellant as denying writs of mandamus not in point	9
5. In cases cited by appellant acts sought to be compelled involved exercise of discretion, while in case at bar act compelled ministerial	9-10
6. Not a judgment against United States and special appropriation not required	10
7. Act in this case ministerial, not discretionary	11-12
Fact that officer must construe statute immaterial	12
8. Comptroller cannot check against naval officers pay	13
9. No distinction between Smith vs. Jackson and case at bar	15
10. Appellant cites but one case which holds that pay of an officer can be checked against and that is a Court of Claims decision	15-16
11. Secretary of Navy ordered appellee paid	17
12. Conclusion	17-18

TABLE OF CASES

	PAGE
Alnav 24	4, 17
Attorney General, letter of, to Secretary of Navy, July, 1924	3
Benedict vs. U. S. 176 U. S. 357	4
Brashear vs. Mason, 6 How. 93	9
Cox vs. Comptroller, not yet reported	4, 10
Dillon vs. Gross, 299 Fed. 851	2, 3, 8, 13
Decatur vs. Paulding, 14 Peters 497	2, 3, 8, 13
Howe vs. Elliott, 300 Fed. 243	3, 10
Judicial Code: Sec. 24, par. 14	5, 7
Kendall vs. U. S., 12 Peters 524	8
Loisel vs. Mortimer, 277 Fed. 882	5, 6, 8, 10, 12, 13
Louisville Cement Co., vs. Interstate Com. Com,, 246 U. S. 638	8
McAdoo vs. Owens, 47 D. C. (App.) 364	11
20 Opinions, Atty. Gen., 626	5, 11
Secretary of Navy opinion	4
Smith vs. Jackson, 241 Fed. 746: 246 U. S. 388	5, 10, 11, 12, 15
U. S. vs. Burchard, 125 U. S. 176	14
U. S. vs. Guthrie, 17 How. 284	9, 10
Wogg vs. U. S., 48 Ct. Cls. 80	16
Works vs. U. S., 298 Fed. 893	8, 12

In the Circuit Court of Appeals of the United States for the Ninth Circuit

E. H. BARBER, Naval Disbursing Officer,
Appellant

vs.

WILLIAM BRAWNER HETFIELD, Appellee

APPELLEE'S REPLY BRIEF

STATEMENT OF THE CASE

Appellant's statement of the facts of the case are acceptable as far as they go, but require some amplification.

What is termed by appellant, overpayments to appellee, arose as follows:

Appellee during the questioned period from April 22, 1919, to March 31, 1922, filed with the appropriate officer, claim or proof in the form required, requesting payments to him on account of his dependent mother. The payments were made.

The Comptroller General, whose position became existent in July, 1921, reviewed these dependency claims in March, 1924, held dependency not proved to his satisfaction, and without any

hearing being accorded appellee, arbitrarily declared the amount of these dependency payments owing from the appellee to the Government. The appellant forthwith refused to pay appellee any part of his pay as a Lieutenant Commander of the Navy declaring the so-called over-payments an offset. This drastic measure was modified to permit the payment of eighty (80%) per cent of appellee's salary, but the remaining twenty (20%) per cent is still being withheld.

This action was instituted to compel payment of the withheld twenty (20%) per cent.

ARGUMENT

The Point at Issue

We believe that there is but one point of law involved in this case, namely: **whether a Federal accounting officer can check against the pay of an officer whose position and compensation are created and fixed by Statute.**

APPELLEE'S PRECEDENTS

Our immediate precedents comprise what might be called the history of the Comptroller General's efforts to arrogate to himself all the functions of national government.

The **Dillon vs. Gross case (299 Fed. 851)** is identical in its issues with the case at bar, the **solitary** point of difference being that the petitioner in that case was a Lieutenant and in this case is a Lieutenant Commander. The Judge of the Dis-

trict Court of Florida before whom the mandamus fell, in a thorough and well reasoned opinion, granted the Writ prayed for on the groud, among others, that "**debts due the government may not be set off against the salary 'demand' of any officer, whose salary is fixed by statute.**"

Complaining bitterly of outraged sovereignty, the Comptroller General insisted upon an appeal from the Florida District Court's decision, but the Solicitor General and the Attorney General held the decision good law and that an appeal did not lie.

Letter Attorney General to Secretary of Navy, of July, 1924, not yet reported.

HOWE VS. ELLIOTT

The Howe case (300 Fed. 243) before District Court in Florida, raised the same points as the Dillon case and the case at bar, and the decision followed the Dillon decision. The Court had the following to say concerning the attitude of the Comptroller General:

"The question seems to me to have been settled adversely to the position taken by the Comptroller General, in the instant case, by the opinion of the Attorney General rendered to the Navy Department. Why this opinion was ignored by the accounting officer is difficult to understand, in the light of the decision of the Courts in the case of Smith vs. Jackson decided in 1918 and referring

to Benedict vs. United States, 176 U. S. 357, decided in 1900."

COX VS. COMPTROLLER

Undaunted by the accumulation of precedents against him, the Comptroller ignores them, and we find him, defendant in person, in the Cox case (rendered by Supreme Court of District of Columbia December 1, 1924, and not yet reported), raising the same points of contention that were raised in all the other cases, including the case at bar. Again for the fourth time he is told by courts of the United States that he is acting **contrary to law** in checking against officer's pay. And yet we find him endeavoring to convince this Court that there are technical reasons, aside from the only point at issue, which prevent the court below from passing upon the issue.

OPINION OF SECRETARY OF THE NAVY

Alnav 24, under date August 11, 1924, reads in part as follows:

> "THE SECRETARY OF THE NAVY IS "OF THE OPPINION THAT THE HOLD- "ING OF THE SUPREME COURT OF "THE UNITED STATES IS DECISIVE "THAT THE SALARY OF OFFICERS "IS NOT SUBJECT TO OFFSET BE- "CAUSE OF CLAIMS OF THE GOVERN- "MENT. THE COMPPTROLLER GEN- "ERAL HOLDS THE CONTRARY "VIEW."

EARLIER PRECEDENTS

Smith vs. Jackson, 241 Fed. 746; 246 U. S. 388: In that case, which has also a mandamus proceeding, a paymaster in the Canal Zone refused to pay the salary of a judge of the Canal Zone Court, claiming the right to offset against the salary, moneys due from the Judge on account of rental of a government house. The court held, in a very exhaustive and well reasoned opinion, that an accounting officer of the United States government cannot check or offset against a salary created by statute, and that the payment of the salary was a ministerial duty and mandamus-able.

The Attorney General, (as in the **Dillon case** (supra)) called upon, for an opinion as to the soundness of the trial court's decision, approved the decision. (20 Ops. Atty. Gen. 626). As in the case at bar, despite the valuable advice of the Attorney General, an appeal was taken which the Supreme Court of the United States, in adopting the lower court's decision, designated frivolous and declared was a proper cause for penalizing, were it not believed the accounting officer was acting in good faith.

In the case of **Loisel vs. Mortimer, 277 Fed. 882,** a clerk of a United States District Court, sought of the District Court in Louisiana a mandamus to compel the United States Marshall to pay his salary, which the Marshall was withholding and offsetting against moneys due the government from

Mortimer. The Court granted the Writ on the ground that such checkage was against law and that the payment of an officer's salary was a ministerial act and could properly be compelled by mandamus.

DISCUSSION OF POINTS OF APPELLANT'S ARGUMENT

Having very briefly called the Court's attention to the precedents upon which appellee based his action, we will now proceed to discuss as briefly as possible, the points appellant has raised in his brief:

Appellant's points, as we read them, are as follows:

1. That appellee's petition for a Writ fails to disclose any ground giving the District Court jurisdiction of the case.

2. That the suit is one against the United States and therefore can only be brought in the Court of Claims where the United States consents to be sued.

3. That Sec. 24 of the Judicial Code denies to District Courts jurisdiction over suits to recover fees, salary, etc., and that the present case is such a suit.

4. That the Courts have refused jurisdiction by mandamus over Federal officials.

5. That the Court cannot compel appellant to pay appellee's salary, because it would re-

quire a special appropriation and a warrant countersigned by the Comptroller.

6. That the lower Court lacked jurisdiction to issue writ because act of Comptroller in fixing salary of appellee is one of discretion.

7. That pay of Naval Officer is not fixed by statute.

8. That appellant and Comptroller have a legal right to check against pay of a Naval Officer.

9. That Smith case is not in point because auditor of canal zone was not such an accounting officer as had power to pass on salary claims.

10. That prior to Dillon and Howe cases right of accounting officers to offset overpaid items in the statement of the account of a Navy or Army Officer was never seriously questioned since 1828.

APPELLANT'S FIRST THREE POINTS

The first three points raised by appellant, as enumerated hereinabove, will be answered under one head.

The lower court properly acquired jurisdiction of the cause at bar by virtue of Sec. 24 of the Judicial Code, paragraph 14, which gives to District Courts original jurisdiction

> "of all suits at law or equity authorized by "law to be brought by any person to redress "the deprivation. * * * of any right, priv-

> "ilege or immunity secured by the Con-
> "stitution of the United States."

In **Dillon** vs. **Gross** (supra), the Court referring to the effect of the Comptroller General's action, said:

> "The more serious question would be "deprivation of relator's property in vio- "lation of his constitutional rights."

This action is not one against the United States. It is an action against an officer of the United States who is violating another's constitutional rights, by an ultra vires and illegal act. A suit to compel a government official to perform a **ministerial** duty is not a suit against the United States.

Works vs. U. S. 298 Fed. 893.
Kendall vs. U. S. 12 Peters, 524.
Loisel vs. Mortimer, 277 Fed. 882.
Louisville Cement Co. vs. Interstate Com. Com., 246 U. S. 638.

This is not a suit to determine and recover compensation or salary, on the part of the officer. The amount of pay and the fact that pay was earned, are not even an issue. While called a mandamus, it amounts in fact and substance to this, that it seeks to enjoin the appellant from **illegally** attempting to offset against a part of appellee's salary, moneys which the Comptroller claims appellee owes the United States.

It is not even a question of whether or not ap-

pellee in fact was improperly paid on his dependency claims, it is purely a question as to whether or not alleged indebtedness of appellee to the United States government can be offset against his statute-given salary.

Appellant cites **Decatur vs. Pauling, 14 Peters, 497, Brashear vs. Mason, 6 Howard, 93,** and **U. S. vs. Guthrie, 17 Howard, 284,** in support of his contention that the courts have refused to take jurisdiction of mandamus of government officials. But in each of the cases cited the court held that it lacked jurisdiction, not because of the subject matter or the character of the action, but because the facts in each case disclosed that the act sought to be compelled was one involving discretion.

In **Brashear vs. Mason** there was a question as to whether the petitioner was entitled to pay at all. He was an officer of the Texas Navy and when the United States annexed the Texas Navy petitioner contended he automatically became a part of the United States Navy and entitled to pay. The court held it was a matter within the discretion of the Secretary of the Navy.

In **Decatur vs. Pauling,** the widow of Stephen Decatur of Tripoli fame, endeavored to compel the Secretary of the Navy to pay her a pension, when that official denied she was entitled thereto. The court held that the exercise of discretion was involved.

In **U. S. vs. Guthrie** a judge who had been re-

moved endeavored to try the title to the office and to recover salary of the office. Court held exercise of discretion involved.

All of the above cases can be reconciled with **Smith vs. Jackson,** (supra). If not reconcilable **Smith vs. Jackson** reverses them.

It requires no efforts at reconciliation to discover that **Smith vs. Jackson, Loisel vs. Mortimer, Dillon vs. Gross, Howe vs. Elliott** and **Cox vs. Comptroller,** are identical in order of facts and application of the law.

APPPELLANT'S CONTENTION THAT MANDAMUS IS NOT ISSUABLE BECAUSE IT WOULD REQUIRE A SPCEIAL APPROPRIATION.

While it is probably true that a judgment against the United States would have to be paid from a special appropriation, such rule is not applicable here. No judgment against the United States is involved but simply an order compelling a ministerial act of an officer. As appears from appellant's brief (on p. 28 thereof) the pay of Naval Officers is taken care of by a blanket approportion **and the salary of officers for the fiscal year 1925 is provided for by Naval Appropriation Act of May 28, 1924.**

The order of the court below is to require the paymaster to pay the salary of the officer as contemplated by the appropriation act, without withholding any part thereof.

APPELLANT'S CONTENTION THAT MANDAMUS DOES NOT LIE BECAUSE COMPTROLLER'S ACT OF FIXING THE SALARY IS A DISCRETIONARY ONE.

For the purpose of this appeal the allegations of the petition must be assumed as true. The paymaster did not refuse payment on the ground that appellee was entitled to no pay, or that under the act of June 10, 1922 it was difficult to determine how much pay he was entitled to. Appellant's ground of withholding the pay, was that the Comptroller General instructed him to offset or check against the pay, amounts which the Comptroller General believed were improperly paid during the years 1919-22.

The pay of appellee depends, of course, on his rank, years in service and character of service. It is to be remembered that it is pay only that is sought here. Once you have those statistics anyone could calculate the amount of the officers pay.

The payment of the salary of a government official by a government accounting officer is a mere misiterial act.

> McAdoo vs. Owens 47 D. C. (App.) 364.
> 20 Opinions, Attorney General, 626.
> Smith vs. Jackson, 241 Fed. 746; 246 U. S. 388.

"The fact that the officer must construe an act

of Congress in ascertaining his duty, does not render it other than ministerial.

Loisel vs. Mortimer 277 Fed. 882.

"In **Works vs. U. S.** 298 Fed. 893 the Court in discussing this point said: "We are called upon therefore to review merely the interpretation based upon the statute by the Secretary and not to review an adjudication based upon issue of fact."

If we followed the appellant's reasoning, as the Court pointed out in **Smith vs. Jackson (241 Fed. at 762)**, "Every executive officer whose duty is plainly devolved upon him by statute might refuse to perform it, and when his refusal is brought before the Court he might successfully plead that the performance of his duty involved an interpretation of the statute by him and therefore it was not ministerial and the Court would on that account be powerless to give relief."

We are constrained to look upon this point of appellant's brief, as an indication, at least, of a lack of that good faith which an official of the government should hold toward lesser officials.

On page 21 of his brief appellant complains that the judgment appealed from is unfair because it requires payment of full salary to appellant without giving the government a hearing on its counterclaim or alleged offset. And yet he sees no injustice in, not only after four or five years reviewing appellee's showings of mother depend-

ency and rejecting them, but even going to the extent of withholding the amounts of the payments thereon, from appellee's salary, without the suggestion of a hearing on the dependency facts.

The judgment of the lower court denies the paymaster or the Comptroller General or the United States Government nothing. It simply says to the two former: you cannot check against the salary of a Federal officer whose pay is fixed by statute, because such action is contrary to law.

We wonder, if the Comptroller General should discover that one of two officers entitled under the act to the identical pay, was not worth his pay, whether he would pay the one and instruct his paymaster to withhold the other's pay and resist mandamus on the ground that he was the supreme accounting officer of the Government and was merely exercising his discretion.

Appellant's point numbered seven herein, is not worthy of consideration.

APPELLANT'S CONTENTION THAT HE AND COMPTROLLER GENERAL HAVE A RIGHT TO CHECK AGAINST PAY OF A NAVAL OFFICER.

This point we have covered sufficiently we believe, under the head of "Precedents," including a discussion of the Smith, Dillon, Mortimer and Howe cases.

We find on page 31 of his brief, appellant argues

that overpayments or payments made to public officers in error can be recovered by the United States, and then quotes from the Burchard case (125 U. S. 176), a point of decision that an officer who receives overpayments has no right to keep them. **In that case the United States was allowed a judgment on its counterclaim.** But here the Comptroller General is not seeking, on behalf of the government, a return of moneys by suing out a counterclaim. He simply deducts the amount of his arbitrary findings from the pay of the Naval Officer in California or China and says to the officer: "If you believe I am in error, buy yourself a ticket, wire for hotel accommodations, come to Washington, hire a strange lawyer and see if you can make me pay."

And if the officer can raise the money to go to Washington, and file his suit there, and pay his attorney's fees, and the like, he will probably find that he lost money in seeking back from his government money wrongfully and illegally withheld.

However, this point also was covered in our early citations.

APPELLANT'S CONTENTION THAT SMITH CASE WAS NOT IN POINT BECAUSE ACCOUNTING OFFICER IN THAT CASE HAD NO SUCH POWER AS HAS COMPTROLLER GENERAL IN THIS CASE.

Appellant draws many fanciful distinctions be-

tween the Smith case and the cases which later accepted it as a leading case, all of which distinctions have escaped four United States District Courts, the Attorney General of the United States, the Solicitor General and the Secretary of the Navy.

These distinctions are (1) that the appropriations for the canal zone provided for the judge's salary, while the naval appropriation, in present case, was a blanket one covering pay of all Naval Officers; (2) that Smith case required no discretion, while present case does; and, (3) that accounting officer in Smith case was not an accounting officer in the sense the appellant is.

But the Smith case hinged on the point which had the Attorney General's support that even though the Judge owed money to the Canal Zone government for house rent, as his salary was fixed by statute, nobody could check against that salary the amount of the house rent, whether a first class accounting officer or a clerical auditor.

APPELLANT'S CONTENTION THAT PRIOR TO DILLON AND HOWE CASES THE RIGHT OF ACCOUNTING OFFICERS TO OFFSET UNPAID ITEMS ON THE STATEMENT OF THE ACCOUNT OF A NAVAL OR ARMY OFFICER WAS NEVER SERIOUSLY QUESTIONED SINCE 1828.

We find this astonishing point stated on page 35 of appellant's brief. Following such a preface

we naturally expected such an array of citations as to make the Smith vs. Jackson, Loisel vs. Mortimer, Dillon and Howe cases seem inconsequental.

But we were doomed to disappointment. There are no citations under this head. Elsewhere in the brief, however, we find a citation which, standing alone, might lend support to this point.

On page 311 we find **Woog vs. United States, 48 Ct. Cls. 80**, cited, which holds that the United States could withhold the pay of an officer of a Marine Corps, until he settled his shortage in funds entrusted to him as treasurer of a post exchange, which appellant at bottom of page 31 of his brief calls a voluntary association of officers and enlisted men, but which the decision stated specifically "**is not** a voluntary association." The court held that the officer was a trustee for the United States and the accounting officer was warranted in holding back pay until trust funds were accounted for.

So the only case cited on this point we were able to discover in appellant's brief is not in direct support thereof and is a weak authority to stand in company with two Attorney General's opinions, a Supreme Court decision and numerous District Court decisions.

Appellant makes some point of the fact that should moneys in hands of the formal appellant become exhausted before appellee's withheld pay can be delivered him, appellant could not carry

out the court's order unless the Comptroller General countersigned a warrant for the remainder. We do not know whether this is an argument or a threat.

THE ORDER OF THE SECREATRY OF NAVY

After arguing that no money could be withdrawn from the Treasury without the consent of the Comptroller General or the Secretary of the Navy, on pages 17 and 19 of his brief appellant remarks that the withholding of appellee's pay was on an order of the Secretary of the Navy.

Appellant is doubtless referring to **Alnav 24** which directed to all disbursing officers, instructs them as follows:

> **"No disbursing officer shall withhold more than twenty per cent because of alleged overpayment.**

And before that on May 20, 1914, by radiogram numbered 0216 the Secretary of Navy specifically directed the appellant **"not to withhold any pay account commutation quarters or subsistence allowance pending instructions from department."**

But apparently the Machiavellian hand of the Comptroller appeared and induced the appellant to disregard the legal instructions of the Secretary of the Navy and regard and follow his own unjust and illegal advice.

CONCLUSION

Appellee earned his pay which no one denies.

His pay is fixed by statute and is in a definite figure. Appellant withholds appellee's pay relying upon instructions from the Comptroller General which are absolutely void and therefore as though never given. The money has been appropriated for all naval officers pay.

The lower court in keeping with justice and all legal precedent has ordered appellant to pay appellee's salary. Similar orders by similar courts have been disregarded. The appeal in this case appears to be one of a series of attacks on the integrity of the courts.

It is trusted that this Court will sustain the ruling of the lower court, thereby possibly compelling the Comptroller to recognize the constitutional rights of naval officers and restore the morale of the navy to its proper pitch.

Respectfully submitted,

JAMES H. FARRAHER,

MOORE AND FARRHER,

Attorneys for Appellee.